THE ELEMENT OF CHANCE IN LAND TITLE.

I.

IN respect of inquiry into title, there is ordinarily a wide difference in practice, as between chattels personal, on the one hand, and land and chattels real, on the other. It is true that in certain classes of dealings with chattels personal, — as in the taking of railway mortgages, in the purchase of corporation stock, and in the lending of money upon mortgages, — there commonly is a formal examination of title, covering such written data as exist in an available form, and including inquiry into some other matters, such as possession. It is also true that in some parts of the country, — chiefly, perhaps, in the long-settled rural communities of the East, — dealings in land are very commonly made with little or no examination of title. Nevertheless it may be laid down as a general proposition that most dealings with chattels personal are made without formal examination of title, while in dealings with land, and with chattels real other than unimportant leases, there is ordinarily some formality of examination, varying with the circumstances of different transactions and with the customs of different communities.

The difference in practice, in respect of these two classes of property, is to a considerable extent arbitrary. It is not based upon lack of data, or even lack of record data, in respect of title to chattels personal, as a class; for, in a multitude of instances where no examination of title is made, there exist definite and available data of title, often in writing, if not in the form of public record, — as, for example, in the case of chattels personal sold by business houses upon the instalment plan. Nor does the difference in practice rest upon a difference in value or importance between the two classes of property. Dealings, without examination of title, with chattels personal, involve in the aggregate vast sums of money, and relate, in a multitude of instances, to articles of great value and of considerable permanency, such as heavy machinery; and, on the other hand, numberless instances of dealings in real estate, attended by strict formality of examination into title, involve only small values.

The difference in practice, in respect of these two classes of property, rests partly upon mere tradition and habit, capable of no justification by argument; partly upon a long experience of the substantial safety of proceeding, in respect of the one class, without examination into title, and of need, or, at least, convenience, of examination into title, in respect of the other class.

In respect of land, and chattels real, the practice of formal examination is, perhaps, as much a matter of habit and tradition as of intelligent precaution; for, in those communities where it is customary to deal in real estate with little or no examination into title, there is no greater sense of insecurity, and probably no greater percentage of actual loss, than in communities where there is a detailed and formal examination. In communities of the latter class the chief practical importance of examination to a given purchaser is, perhaps, the protection that it affords, not so much against loss, but against criticism by subsequent purchasers.

The writer does not wish to criticise the custom of dealing in land with little or no examination of title; on the contrary his observation has led him to the opinion that in the communities where that custom is generally followed, it works very well, and that under the system of land title now prevailing in this country, the defects most likely to involve loss are those which would not be disclosed by formal examination. He recognizes, however, the fact that it is in only a limited class of communities that the simple custom prevails, and that in even those communities it is liable at any time to be brought to an end, by rise in value of the land, or the introduction of a new class of purchasers. He recognizes, therefore, the practice of formal and detailed examination as the prevailing American practice, and he desires here to treat the question how far that practice, as it exists, is complete and systematic, and to what extent it eliminates the element of chance.

The characteristic feature of most dealings in chattels personal, and of such dealings in land as are had without formal examination, is the taking of chances. Elaborate examination proceeds upon the theory that, unless in simple communities and in unimportant instances, chances should not be taken. There is an implied assertion, on the part of conveyancers, or at least a general belief of clients, that the present stricter form of examination substantially covers the field of possible defects, or at least all such features of title as can be inquired into. Perhaps it is not too much to say that the very existence of the practice of elaborate examination

amounts to a profession that such degree, extent, and features of inquiry as are practicable shall not be arbitrarily renounced in favor of the element of chance.

But in fact, the system of elaborate examination, as it is practised, has no just claim to completeness or symmetry. Not only is it incomplete, but it is arbitrarily incomplete. It makes arbitrary selection of the features of title with which it will and with which it will not deal; and while it appears to condemn the deliberate taking of chances, it nevertheless does admit that element into title, as distinctly, — although, of course, not as largely, — as does the system of little or no examination.

In a former article in this Review [1] the present writer pointed out a number of essentials of title, nowhere to be discovered of record, and almost invariably taken on trust. Among these were: the genuineness of signatures of grantors and of certifying magistrates in recorded deeds; jurisdiction and authority of such magistrates; status and identity of persons professing to be heirs, and to be all the heirs; sanity; full age; the fact and the validity of marriage; the fact and the validity of divorce, in its direct operation (in respect, for example, of inchoate dower), and its indirect operation (as the basis of subsequent marriage); prescription; adverse possession; identity of physical boundary marks; the fact and the validity of votes of domestic and of foreign corporations; death; servitudes created by acceptance of a deed of other land; loss of an easement by executed parol license; [2] loss of title by election (as, by accepting, under a will, a benefit inconsistent with the retaining of the recipient's own land).

Other examples may be suggested.

(1) In Massachusetts, a town (and probably a religious parish) may convey land by vote, without a deed. In such a case the transfer will not appear upon the ordinary land records.

(2) A deed of land may be so framed as to leave the question of boundaries practically a mere question of oral agreement: as, where a deed bounds simply by the grantor's "other land," and the boundary line is fixed merely by the setting of stakes.[3]

(3) Metes, given in a deed in such form as, upon mere construction, to be controlling, may have been controlled by acts of the parties at the delivery of the deed.[4]

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[1] "Record Title to Land," HARVARD LAW REVIEW, vi. 302.

[2] Boston & Maine R. R. *v.* Doherty, 154 Mass. 314, and cas. cit.

[3] Hooten *v.* Comerford, 152 Mass. 591.

[4] Dodd *v.* Witt, 139 Mass. 63.

(4) Declarations of the owner of land, made on the land, in disparagement of his title, — as, for example, admissions of an easement upon it, — are admissible in some, if not all, of the States, as against subsequent owners, although not known to them when they purchased.[1] It may well happen that the declarations were made by the person who alone knew the fact in question, and were made under such circumstances, and have such corroboration, that, if the making of them be proved, they will almost with certainty operate to limit the title. In many cases the situation is such that a given purchaser cannot protect himself against the possibility of such declarations having been made. In those cases he must take the title, so far, upon trust. And where the persons who may have made such declarations are living, the only way of covering the field with any certainty is to resort to depositions *in perpetuam.*

(5) Under the rule of *lis pendens*, a court having jurisdiction of a cause which may affect by its judgment the title of land, has, as a necessary incident of jurisdiction, a right that the title shall not be interfered with until after opportunity for operation of the judgment; and therefore, as against the judgment, a conveyance *pendente lite* is of no effect, but the purchaser takes subject to the judgment. It is ordinarily the defendant whose grant *pendente lite* would, if effectual, interfere with the operation of the judgment; but it may be the plaintiff.[2] Except in so far as this rule may, in respect of a given region, have been qualified, and effectually qualified, by statute, an examiner of title, to be exact, should search the records of all courts capable of jurisdiction, to see that there is no such pending suit. It is true that in many, and perhaps in all, of the States, it is provided that, to make *lis pendens* operative, there must be filed in the registry of deeds a notice of the suit. In Massachusetts such a provision has been in force since 1877. It is believed, however, that prior to the passage of that act, it was never the practice in Massachusetts to take precautions against *lis pendens*, although the enactment of the statute was a confession that there had been an element of danger in that respect.

But State *lis pendens* statutes of this class, while capable of affording effectual protection against suits pending within the courts of the State, are by no means completely effectual. A suit

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[1] 1 Greenleaf, Evidence, § 109; Blake *v.* Everett, 1 Allen, 248; Pickering *v.* Reynolds, 119 Mass. 111.

[2] Pomeroy, Eq. Jurispr., par. 638; Henderson *v.* Wanamaker, 25 C. C. A. 181; 79 Fed. Rep. 736.

pending in a Federal court sitting within the State is as completely operative in respect of title to land within the State as a suit in a State court; but State statutes cannot force a Federal lien upon the State records;[1] and it would seem, by parity of reasoning, that they cannot so affect any form of priority having its foundation in the Federal Constitution and laws. Undoubtedly such classes of Federal liens as are mere matter of procedure at law (as, the lien of mesne attachment, in an action at law, under the Massachusetts practice), may be, and in the Massachusetts district, at least, are, provided for by rule of the Federal court, requiring notice upon the State records, as in the State practice; but this courtesy, however far it may be carried in respect of actions at law, has no place in the Federal equity procedure in respect of *lis pendens*. The writer has never known of systematic precaution against such Federal suits. In Massachusetts, certainly, the question of the possible existence of such a priority is, as a rule, left to chance.

There is a further possible operation of *lis pendens*. It is by no means clear that it has not an extra-territorial operation, from one State into another. The reason of the rule of *lis pendens* seems to require a disregard of State lines; and it has been more than once held — without, however, any discussion of a possible limiting effect of a *lis pendens* notice statute — that a suit pending in one State has such extra-territorial operation in another State.[2]

It is possible that a State statute requiring record notice of a pending suit may operate against a suit in a court of another State. The ordinary form of statute of this class, however, would perhaps not be construed to intend such an operation; and, moreover, the extra-territorial force of a judicial proceeding of a State stands upon the Federal Constitution as truly as does a Federal lien, such as was in question in United States *v.* Snyder; and it well may, therefore, like such a Federal lien, be within the principle of United States *v.* Snyder, and thus not subject to control by a State recording statute.

It is not the object of this article to argue unsettled questions; but it is proper to point out that the doctrine of *lis pendens* offers, in respect of many Federal suits, and perhaps in respect of suits in other States and in other Federal districts, at least a possibility of defect, in every title, as serious as many a possibility against which a conveyancer provides with minute care.

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[1] United States *v.* Snyder, 149 U. S. 210.

[2] Bennett, Lis Pendens, § 83; "Territorial Extent of Lis Pendens," and cas. cit.

(6) Distinct from the operation of *lis pendens* is the operation of a judgment. Title may, of course, be devested or qualified by a judgment, as well as by deed. Yet, in many of the States, there is no provision for convenient notice of such judgments. In Massachusetts, notwithstanding the passage, in 1877, of the *lis pendens* statute, no provision was made in respect of convenient notice of change of title by judgment until 1892, when such notice was required to be filed in the registry of deeds;[1] and even this statute would appear to reach only domestic judgments of the courts of Massachusetts.

(7) The Federal lien for internal revenue taxes[2] is, at least in the East, ordinarily ignored. There are in this country thousands of landowners who are manufacturers of tobacco, or distillers, or brewers, and there must be frequent and important sales of land by them. All real estate, of whatever nature and wherever situated, owned by any such person, is subject to a lien for internal revenue taxes due from him.[3] The tax rate is heavy, and a tax may, in a given case, amount to a large sum.[4] The lien is not subject to State legislation, in respect of requirement of record notice,[5] and is effectual as against an innocent purchaser for value.[6]

In the case last cited the facts were as follows: The defendant was, in 1878, a tobacco manufacturer in New Orleans, and became indebted for taxes in the sum of several thousand dollars. He was the owner of real estate in Louisiana. The Constitution of that State provided that no "privilege" on real estate should be effectual unless registered in a certain State office. It was not denied that the word "privilege" included liens; and the lien in question was not registered in accordance with the requirements of the State Constitution. In 1881, the tax remaining unpaid, Snyder sold and conveyed his property to an innocent purchaser. Four years later the United States began suit to enforce the lien, making the purchaser a defendant. It was contended that the lien was ineffectual as against the purchaser; but the court held otherwise, and enforced it.

(8) The matter of divorce has been alluded to above, with reference to its bearing on dower and on the validity of subsequent marriage. There is another aspect of it, material to the question

[1] St. 1892, c. 289.

[2] U. S. Rev. Sts., § 3186, as amended by Act of March 1, 1879, § 3; § 3207.

[3] Sts. above cited.

[4] U. S. Rev. St., §§ 3251, 3368.

[5] United States *v.* Snyder, 149 U. S. 210.

[6] Ibid.

of land title, and yet but little discussed in the East. A number of the States have divorce procedure statutes based, in a certain sense, upon the theory of alimony, but differing widely from that theory, and providing, in one form or another, for an allotment of property of one of the parties to the other party. These statutes differ widely in their particulars, some relating only to real estate, some to both real and personal estate; some professing to allot property by their own force, without aid from the decree of the court, others leaving the allotment to the court.[1] In some of these statutes, no distinction is drawn between petitioner and respondent, or between husband and wife, but property of either may be allotted to the other. It is, of course, not uncommon for a husband or wife who wishes a divorce to create a domicil in a distant State with a view to a divorce; and even where an effectual change of domicil is not effected there may be a colorable change. Under the doctrine which now generally prevails in this country, and may fairly be said to be established, a decree of divorce effectual to dissolve the marriage tie may be made without such personal jurisdiction over the respondent, whether husband or wife, as would be essential to an ordinary personal judgment.[2] Moreover, a wife physically absent may have been physically a resident, and may in law, by reason of the marriage, still be a citizen, of the State, taking jurisdiction; and even where a respondent wife has never been physically within such State, still, if she is living apart from her husband without sufficient cause, the courts of the State of his residence may have jurisdiction over her, as over any other citizen, and may hold her, by substituted service, to a decree, operative *in personam*, and operative upon her property outside the State, through the medium of a judgment in another State based upon the original judgment. The whole question of divorce and its incidents is one of great complication; but there is no doubt that the petitioner may be bound, in respect of his or her property outside the State, by a decree of allotment of it to the respondent; and there are situations under which he or she might get a judgment probably enforceable as against real estate of the respondent in another State. It would seem to follow that where one step in a chain of title is divorce in another State, the examiner should, if his examination is

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[1] 2 Bishop, Marriage, Divorce, and Separation, §§ 1117 *et seq.*

[2] 2 Bishop, Marriage, Divorce, and Separation, §§ 137, 153, 185; 2 Black, Judgments, §§ 925, 928, 932; Pennoyer *v.* Neff, 95 U. S. 714, 734.

to be exhaustive, look into the question of such statutes in the State granting the divorce, and into the record of the divorce suit.

(9) Constitutional law receives very little attention in the examination of titles. Objection to a title based upon constitutional grounds would, unless supported by a decision precisely in point, ordinarily be viewed as fine-spun; and a conveyancer who should profess to have made a careful study of State and Federal constitutional law with a view to titles, and should be in the habit of discussing the constitutionality of State statutes, or a possible limitation of their operation by reason of the Federal Constitution, would, unless of unusual force, lose credit for good judgment, though his learning might be sound, and the questions sensible and important. There was, it is true, a long period in the history of this country when, owing to the comparative simplicity of the questions commonly in dispute in land-title and the common-law character of those questions, to the absence of the great variety of modern statutes providing for the extinguishment of defects in title, and owing, further, to the lack of the provision which came into force with the Fourteenth Amendment, constitutional difficulties could, perhaps, be said, as a class, to be mere bugaboos; and at that time a conveyancer known to be apprehensive of constitutional difficulties might be viewed with a critical eye. To-day, however, we are in a new era of land-title. In the older of the thickly-settled communities the writ of entry is obsolete, and disputed questions of title, in so far as they are questions of law, frequently turn, not upon common law principles or upon statutes confessedly dealing only with matters of State cognizance, but upon principles of general equity jurisprudence, as declared or as enlarged by statute; upon the competency of State statutes to bind persons not in being, or not ascertainable, non-residents, and the like. Notwithstanding this change, there still remains a good deal of the old half-disguised contempt for constitutional law in respect of the daily handling of real estate titles.

A striking illustration of this is afforded by the fact that the two enactments which have been made in this country approximating to the Torrens legislation, were both unconstitutional.

The legislation of most of our States abounds in modern statutes aimed at the clearing of titles from apparent adverse interests vested, if they exist, in persons outside the jurisdiction, or not as yet in being, or not ascertainable; and titles are being passed every day upon the faith of such statutes. It is competent to our

State legislatures to pass statutes of this class almost without limitation of extent. There is, however, a strict limitation in respect of the form in which the legislative power can be exercised; and yet there is great inattention to this limitation, in the framing of such statutes, and in passing titles under them. The principles upon which the efficacy of legislation of this kind turns, are few and simple. They may be summarized as follows: (*a*) Under the principles of general equity jurisprudence, a decree in equity operates only upon the defendant, and cannot be made effectual without jurisdiction of his person. (*b*) Except, perhaps, in a limited class of cases, where the rule of suing only representative defendants may be invoked, the defendants must be in existence, and ascertainable and known. (*c*) The State legislatures have the power of making extensions of ancient equities and equity procedures, and such extensions have the force, and are entitled to all the recognition, of the ancient equities and procedures. (*d*) This legislative power covers all the ancient equities relating to the clearing of titles. (*e*) Under this power a State may, by statute, dispense with all the limitations existing in the ancient equity jurisprudence, and may provide for a decree operative as against non-residents, persons not in being, and persons unknown, or not ascertainable, and may provide for the operation of the decree directly *in rem* upon the land, or for the setting up of a substitute, or quasi-trustee, to give a deed of release in behalf of possible hostile claimants not personally within the jurisdiction.

The phraseology necessary to the effectuality of such statutes has been repeatedly declared by the Supreme Court of the United States, and notwithstanding the difficulty originally existing in the subject, nothing has been easier, for a considerable time past, than to insert in a new statute the phrases essential to its validity, the chief of which is a provision in terms that the decree shall operate directly upon the land, or that there shall be a substituted grantor. Nevertheless, throughout the country there are statutes of this class, which are drawn without the least attention to these principles, and titles are constantly being made under them without the slightest regard to the question of their constitutionality. In the Massachusetts legislation there is no uniformity in this respect: some of the modern title-clearing statutes have been drawn in strict accordance with the constitutional requirements, while others make no provision either that the decree shall operate *in rem* upon the land, or that there shall be a substituted releasor. The writer has

no occasion, in respect of any given statute, to argue that it is unconstitutional. It is sufficient for his present purpose to point out that such statutes as he has last mentioned are often drawn without an eye to the constitutional requirements; that it is only by aid of construction, if at all, that they can be held to be constitutional; that it is only a matter of good fortune if they are constitutional; that statutes which it is difficult to distinguish from them in phraseology have repeatedly been declared unconstitutional; and that such statutes, in actual conveyancing practice, pass current as freely as statutes unquestionably constitutional.

Another familiar class of statutes affecting titles, are those which profess to bring in non-resident defendants by advertisement, and subject them to a personal judgment.[1] It seems quite clear that a judgment under such a statute was not valid, out of the State in which it was rendered, even prior to the Fourteenth Amendment,[2] or even within the State.[3] Under such a statute, however, an execution title, perfect in form, might be got. The decision in Pennoyer *v.* Neff was rendered in 1877. In Massachusetts, — as, probably, in other States, — things nevertheless went on smoothly, and such judgments continued to be rendered, at least as late as 1880.[4] As late as 1885, a suit was maintained upon such a judgment.[5] So things stood in Massachusetts, until 1887, when it was held, on the authority of Pennoyer *v.* Neff and of Freeman *v.* Alderson,[6] that a writ of error would lie to reverse such a judgment.[7] The next year it was decided that such a judgment might be attacked, and treated as a nullity, collaterally.[8] No one knows how many apparent titles have been made in different States, under statutes of this class, before and since the Fourteenth Amendment; nevertheless, most conveyancers, at least in the East, would have passed such a title, unless the ineffectuality of such statutes had been forced upon their attention by a decision in the courts of their own State. Indeed, nothing could be more significant of the disregard often paid to constitutional difficul-

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[1] See Mass. Gen. Sts., c. 123, §§ 23–28; c. 126, § 6; Pub. Sts., c. 161, §§ 29–34; c. 164, § 6 *et seq.*

[2] D'Arcy *v.* Ketchum, 11 Howard, 165.

[3] D'Arcy *v.* Ketchum; Pennoyer *v.* Neff, 95 U. S. 714.

[4] See McCormick *v.* Fiske, 138 Mass. 379.

[5] McCormick *v.* Fiske, above cited.

[6] 119 U. S. 185.

[7] Eliot *v.* McCormick, 144 Mass. 10.

[8] Needham *v.* Thayer, 147 Mass. 536.

ties, than the fact that the Supreme Court of Massachusetts — a court of learning, and always courageous in respect of constitutionality — did not have present to its attention, in 1885, the law of Pennoyer *v.* Neff.

In closing, the writer desires to say, what he has said above, that he does not present these considerations as an alarmist; but that, on the contrary, he has quite as much faith as any one, and probably more faith than most members of his profession, in the safety of the practice of taking title, as a rule, with little or no examination; and that his main object in this article is to point out that the elaborate form of examination of title, where it is practised in this country, is neither complete nor even systematic in its omissions; that its selection of elements for examination and for omission is based upon no considerations of relative importance or relative percentage of risk, but upon habit and tradition; and that such arguments as there are, — and they are many and weighty, — in favor of an elaborate examination, logically call for an examination very different from what is made by even the best conveyancers to-day. It is his aim also to suggest that the possible defects in a given title in this country, under our system of government, are such and so numerous that if we are to have any approach to a really authoritative assurance of title, we need, in our States, a logical rounding-out of our present legislation, to its full constitutional limits, so that in the ninety-nine cases in a hundred where unknown possible defects do not in fact exist, there may be relief from the necessity of investigation into the question of their existence, and a sweeping and effectual decree of exclusion of them. Finally, he has desired to bring to notice the consideration, that, for any approach to completeness, the co-operation of Congress must be invoked in respect of those classes of possible adverse interests which, if they exist, rest upon the Federal Constitution and laws in such sense as to be thereby exempt from State legislation.

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